

DATE: February 4, 2020

In Re:)
[REDACTED]) Claims Case No. 2019-CL-040308.2
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

The interpretation of a statutory provision and implementing regulation by an agency charged with their execution, and the implementation of them by means of a consistent administrative practice, is to be sustained unless shown to be arbitrary, capricious or contrary to law.

DECISION

A retired member of the U.S. Air Force (USAF) requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2019-CL-040308, dated December 4, 2019.

Background

On May 1, 2017, the member retired after serving 30 years in the USAF. His over 14-year marriage from April 4, 1992, until his divorce on March 30, 2007, overlapped with his service in the USAF. The member's divorce decree provided for a division of his military retired pay based on a sum equal to 50% of the disposable retired pay of an E8 with 14 years and 5 months of creditable service. After the divorce the member served another 10 years and was promoted to an E9 during this time period.

On July 5, 2018, the member's former spouse obtained a Qualified Domestic Relations Order (QDRO). On July 25, 2018, she submitted it along with a DD Form 2293, *Application for Former Spouse Payments of Retired Pay*, to the Defense Finance and Accounting Service

(DFAS) requesting her share of the member's retired pay pursuant to the Uniformed Services Former Spouses' Protection Act (USFSPA). The QDRO ordered the division of the member's retired pay based upon a specific formula that differed from the calculation originally reflected in the divorce decree. The QDRO stated the following:

IT IS ORDERED that Former Spouse is awarded a percentage of the Servicemember's disposable retired pay, to be computed by multiplying 50% times a fraction, the numerator of which is 173 months of marriage during the Servicemember's creditable military service, divided by the member's total number of months of creditable military service.

DFAS determined that since the member served for 30 years, the denominator was 360 months. Based on the formula, DFAS calculated that the former spouse was entitled to 24% of the member's retired pay. On August 13, 2018, DFAS approved the former spouse's application and on October 1, 2018, payments were set to commence.

As required by regulation, DFAS informed the member in a letter dated August 13, 2018, that it had received an application from his former spouse for payment of a portion of his retired pay and that DFAS was required by the USFSPA to pay the former spouse a portion of his retired pay pursuant to a final court order. DFAS specifically advised the member:

If the enclosed court order has been amended, superseded, or set aside, it is your responsibility to notify us within 30 days of this letter and provide court-certified copies of the pertinent documentation. Submission of such documentation constitutes consent to the disclosure of such information to the former spouse or the former spouse's attorney. Unless we receive such notice within 30 days, we will honor your former spouse's application.

The member contacted DFAS by phone on September 11, 2018. He subsequently followed up his call with a letter dated September 25, 2018. In his letter he disputed the calculation in the QDRO and requested payments not be made to his former spouse until the state court issued an amended order.

On October 4, 2018, DFAS informed the member that it found the QDRO to be legally sufficient and that the division of property application met all the statutory requirements of the USFSPA. DFAS advised the member that any legal objections that he has with the divorce decree and QDRO should be addressed with the state court that issued the decree. DFAS noted that there was a difference between the 2007 divorce decree and the 2018 QDRO. DFAS directed the member's attention to paragraphs 290612 and 290616 of the Department of Defense Financial Management Regulation (DoDFMR), which detail that the most recent court order supersedes all prior orders, and that it is the responsibility of the party asserting the error to petition the court to correct the order. DFAS denied the member's request to stop payments for the division of property awarded pursuant to the QDRO and gave the member his appeal rights to DOHA.

The DOHA appeal decision upheld DFAS's denial of the member's claim. In the appeal decision, the adjudicator explained that DFAS was required under the USFSPA to make direct payment to the member's former spouse pursuant to the latest court order, the QDRO, because that order was valid on its face and presented by the former spouse to DFAS in accordance with the applicable statute and regulations. In the member's reconsideration request, he states that he was not given proper notification of the issuance of the QDRO either by the state court or DFAS. He believes that he was denied due process because he was unable to timely and adequately contest the calculation and amount of his former spouse's share of his retired pay in state court. He and his attorney are currently contesting the validity of the QDRO and seeking an amended court order in state court. However, he questions why DFAS was not able to stay payment to his former spouse until the matter was settled in court.

Discussion

Under DoD Instruction 1340.21 (May 12, 2004), the claimant must prove, by clear and convincing evidence on the written record, that the United States is liable to the claimant for the amount claimed. Federal agencies and officials must act within the authority granted to them by statute in issuing regulations. Thus, the liability of the United States is limited to that provided by law (including implementing regulations). The interpretation of a statutory provision and implementing regulation by an agency charged with their execution, and the implementation of them by means of a consistent administrative practice, is to be sustained unless shown to be arbitrary, capricious or contrary to law.

The USFSPA gives state courts the authority to treat a member's disposable retired pay either as property of the member or as the property of the member and his spouse, in accordance with the law of the jurisdiction of such court. *See* 10 U.S.C. § 1408(c)(1). The USFSPA also directs the government, subject to certain limitations, to withhold and make direct payments to the former spouse in the amount specified in the court order. All valid court orders directing payment of a portion of retired pay to the former spouse must be honored if the divorcing couple was married for at least 10 years during which the member was in the service. Absent facial invalidity of the court order, the government is not liable with respect to any payments made in conformity with a state court order under authority of the USFSPA. *See* DOHA Claims Case No. 2013-CL-110501.2 (July 17, 2014); DOHA Claims Case No. 2013-CL-062801.2 (October 31, 2013); and Comptroller General decision B-221190, Feb. 11, 1986.

DFAS properly honored the member's former spouse's request to receive direct payment of a portion of the member's retired pay by implementing the retired pay calculation language in the QDRO. As noted above, paragraphs 290612 and 290616 of the DoDFMR provide that the order issued most recently supersedes all prior orders and that it is the responsibility of the party asserting the error to petition the court to correct the order. Absent anything on the face of the order indicating that it was issued without proper legal authority, DFAS is obligated to make payment under the USFSPA. DFAS determined the QDRO was proper on its face. Therefore, DFAS had no further obligation to go beyond the face of the court order. To the extent that the member takes issue with the language contained in the QDRO, he must raise the matter with the

court. Under the USFSPA, DFAS was required to make payment and had no authority to stay payments to the former spouse while the member sought remedy in state court.

DFAS acted properly and consistent with its regulations in preserving the member's rights under the USFSPA. On August 13, 2018, DFAS notified the member that his former spouse had submitted an application for payment of a portion of his retired pay based on the QDRO. DFAS included the QDRO in its notification to the member as required under DoDFMR ¶ 290502. DFAS provided the member with the opportunity to raise his concerns with DFAS or seek relief in state court. On September 25, 2018, the member wrote DFAS asserting the issues of lack of notice and the improper calculation of his former spouse's portion of his retired pay pursuant to a legally defective QDRO. On October 4, 2018, DFAS addressed the member's concerns. Although DFAS acknowledged the differences in the 2007 divorce decree and 2018 QDRO, DFAS explained that it had no authority to stay payments and advised the member that his remedy was in state court. In addition, DFAS properly informed the member of his appeal rights to DOHA.

Conclusion

The member's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2019-CL-040308 disallowing the claim. In accordance with DoD Instruction 1340.21 ¶ E7.15.2, this is the final administrative action of the Department of Defense in this matter.

SIGNED: Catherine M. Engstrom

Catherine M. Engstrom
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board